

**REPORT
ON
FAMILY PROPERTY LAW**

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY





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The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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In the *Report on Family Property Law*, the Ontario Law Reform Commission recommends amendments to the legislative scheme for the equalization of the value of family property between spouses. The Commission first examined the laws regarding the sharing of property between spouses in Part IV of the *Report on Family Law: Family Property Law* (1974). The province enacted provisions for the equalization of family property between spouses in Part I of the *Family Law Act* of 1986 that substantially reflect the recommendations of the Commission in 1974. In the seven years since the introduction of this legislation, difficulties experienced by spouses and counsel with the operation of the statute have indicated the need for further reforms. In this report, the Commission suggests changes to improve the efficiency and fairness of the equalization scheme. As well, in the years since the Commission issued its first report on family property common law remedies available to spouses have evolved. Today, spouses have access to both the rights and remedies provided in the *Family Law Act* and those available at common law. In this report, the Commission also examines the common law remedies and their continued relevance in light of a reformed statutory scheme.

In response to concerns about particular elements of the statutory equalization scheme, the Commission makes a number of recommendations designed to ensure that the fundamental object of the legislation, the sharing of wealth generated during a relationship, is achieved. For example, the Commission recommends that the legislation should be varied to allow the sharing of a substantial fluctuation in the value of an asset between the statutory valuation date and the trial if necessary to ensure an equitable result, having regard to the cause of the fluctuation. As well, the Commission recommends that spouses should share any change in value during the relationship of any asset that a spouse acquires independently from the relationship, such as a gift or an inheritance. The Commission further recommends amending the law to ensure that the family home [“matrimonial home”] is treated like other assets for the purposes of equalization. While the Commission strongly supports the principle that spouses should always share any change in the value of a family home during a relationship and reaffirms spousal rights to possession in the home and restrictions on the ability of a spouse to encumber or dispose of the home, it believes that the current practice of preventing a spouse from deducting the value of a home owned at the date of marriage, or acquired independently of the marriage, is unfair.

The Commission recommends the introduction of new measures to discourage avoidance of the Act. The Commission proposes a “claw back” of the value of an asset disposed of by a spouse with the intent of avoiding the legislative sharing of the value of family property. If that spouse has insufficient assets to satisfy an equalization payment calculated on the basis of a “claw back”, the Commission recommends that the other spouse have the right to apply to have the transaction reversed. To succeed in such an application, the spouse would have to demonstrate that both the spouse-transferor and the transferee intended to defeat a claim a spouse may have under the Act by the transaction. If the impugned transaction occurred within three months of the same spouse initiating a separation, the Commission recommends that the statute should create a presumption that the spouse had the requisite intent. No such presumption should extend to the intent of the transferee.

The Commission also makes a number of recommendations to change the statutory provisions that apply for equalization at the death of a spouse. The Commission recommends that the spouses’ property should be valued immediately after death and that the value of insurance benefits that accrue because of the death should be included in the property of the survivor. As well, the Commission makes several recommendations designed to grant surviving spouses additional time to make decisions about whether to elect statutory equalization and to retain possession of the family home after death. The Commission makes proposals to increase the flexibility of the statutory provisions, including amending the Act to allow a spouse to revoke an election at any time with leave of a judge and to confirm that a substitute decision-maker may make an election for an incapacitated surviving spouse.

The Commission examines the interaction of statutory and common law remedies for the sharing of family property between spouses. Spouses have sought declarations of remedial constructive trust to compensate for problems in the operation of the statute, as currently drafted. For example, many spouses make such applications to share in post-valuation date fluctuations in value. If the Commission’s recommendations to remedy problems with the operation of the existing equalization provisions are acted on, the need for the common law remedy, will diminish correspondingly. The Commission considers the disadvantages of the common law remedy which suffers from uncertainty of application of the doctrine and creates evidentiary difficulties that add significantly to litigation costs. The Commission concludes that spouses who receive the benefit of statutory equalization of family property should be denied the right to seek declarations of trust as restitution for a contribution to the acquisition, preservation, or enhancement of property held by the other spouse.

This report is one of three in which the Commission addresses a number of pressing issues in family law. The Commission considers complex problems that have arisen in the sharing of pensions under the equalization scheme in the companion *Report on Pensions as Family Property: Valuation and Division* (1993) and the legitimacy of the current definition of spouse in the *Family Law Act* in the companion *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* (1993).

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 4 PROBLEMS WITH THE OPERATION OF PART I OF THE *FAMILY LAW ACT*

VARIATION

1. Section 5(6) of the *Family Law Act* should be amended to empower courts to order an equalization payment, calculated on the basis of each spouse's net family property, where the spouses have equal net family properties, if the result would otherwise be unconscionable, having regard to the factors listed in section 5(6). (at 68)
2. Part I of the *Family Law Act* should be amended to grant courts the discretion to vary an equalization payment to recognize a substantial post-valuation date change in value of an asset if necessary to ensure an equitable result, having regard to the cause of the fluctuation. (at 71)
3. Section 5(6) of the *Family Law Act* should be amended to state expressly that courts may consider post-separation conduct to the extent that it is relevant to the factors listed in that section. (at 71)
4. Part I of the *Family Law Act* should be amended to make it clear that prejudgment interest is available under the provisions of the *Courts of Justice Act*. (at 72)

EXCLUSIONS, DEDUCTIONS, AND SPECIAL TREATMENT OF THE MATRIMONIAL HOME

5. (1) Section 4 of the *Family Law Act* should be amended to provide that all gains or losses in the capital value of an asset listed in section 4(2) and income earned on such an asset must be included in the net family property of its owner.

- (2) Gains or losses in the capital value of an excluded asset should be defined as the change in value accruing between the later of the date of marriage and the date of receipt, and the valuation date. (at 77)
- 6. Clause 2 of section 4(2), which excludes from net family property income earned on property acquired by gift or inheritance where the donor or testator expressly stated that the income is to be excluded, should be repealed. (at 78)
- 7. Paragraph (b) of the definition of “net family property” in section 4(1), and section 4(2) of the *Family Law Act* should be amended to delete the special treatment of the family home [“matrimonial home”] for the purposes of Part I of the Act. (at 85)
- 8. If the Legislature does not implement the Commission’s recommendation to include all capital gains and losses in the value of excluded assets in the net family property of an owner (see recommendation 5(1)), the Commission recommends that it should implement this reform with respect to the family home [“matrimonial home”], alone. (at 85)

THE EFFECTIVENESS OF PROVISIONS ENFORCING SPOUSAL FAMILY PROPERTY RIGHTS

- 9. Paragraph (b) of the definition of “property” in section 4(1) of the *Family Law Act* should be amended to include only property disposed of by a spouse over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property in favour of himself or herself. (at 89)
- 10. Part I of the *Family Law Act* should be amended to provide as follows:
 - (a) where a spouse transfers an asset with the intent to defeat a claim that his or her spouse may have under the Act, the value of that asset should be included in his or her net family property;
 - (b) where a spouse has insufficient assets to satisfy an equalization claim calculated on the basis of the value of an asset transferred with the intent to defeat a claim that his or her spouse may have under the *Family Law Act*, and the transferee knew, or ought to

have known, of his or her intent to defeat the claim, the following rules apply:

- (i) the transaction is voidable as against his or her spouse;
- (ii) where the transaction is avoided,
 - a. the property in the asset is revested in the spouse;
 - b. the transferee is entitled to restitution for the value given in consideration of the transfer, subject to a deduction for the value of any benefit received from the use or enjoyment of the property; and
 - c. the transferee is liable for any depreciation in the value of the asset from the date of the transfer;
- (iii) where the transaction is avoided and, prior to avoidance, the asset has been further transferred:
 - a. to a *bona fide* purchaser for value without notice, the transferor is liable for the proceeds of the transfer, or, in the event that the transfer was undertaken in bad faith, for the market value of the asset, whichever is higher; and
 - b. to a subsequent transferee not acting in good faith, or to a donee, the subsequent transferee or donee is liable in the same manner as the first transferee;
- (c) where a spouse transfers an asset within three months of initiating a separation, a rebuttable presumption arises that he or she intended to defeat a claim that his or her spouse may have under the Act; and
- (d) where a spouse applies to have a transaction avoided under paragraph (b), the transferee should receive notice of this application and have the rights of a party to the application.
(at 99-100)

CHAPTER 5 PROBLEMS CONCERNING EQUALIZATION AT DEATH

VALUATION DATE

11. Clause 5 of the definition of “valuation date” in section 4(1) of the *Family Law Act* should be amended to provide that when one spouse dies and is survived by the other, the valuation date is the date of death, and the time of valuation is immediately after death. (at 110)
12. The definition of “net family property” in section 4(1) of the *Family Law Act* should be amended to provide as follows:
 - (a) property other than property excluded under section 4(2) of which the deceased spouse was competent to dispose immediately before death should be included in that spouse’s net family property at its value on the valuation date, except to the extent that the property is otherwise included in the net family property of the surviving spouse; and
 - (b) pension or insurance benefits received by the surviving spouse in consequence of the death of the other spouse should be included in the net family property of the surviving spouse and excluded from that of the deceased spouse. (at 110)

CREDITS AGAINST EQUALIZATION PAYMENT

13. If, and only if, the Legislature implements recommendation 11, sections 6(6) and (7) of the *Family Law Act* should be repealed. (at 111)

ELECTION

14. Section 6(1) of the *Family Law Act* should be amended to provide expressly that a substitute decision-maker, such as an attorney under a continuing power of attorney and a committee, may make an election on behalf of a surviving spouse. (at 115)
15. Part I of the *Family Law Act* should be amended to permit elections, including deemed elections, to be revoked at any time with leave of a judge on notice to all interested parties. (at 115)
16. Section 6(16) of the *Family Law Act* should be amended to apply when a surviving spouse revokes an election or deemed election for a

will or a share of the estate according to the rules of intestacy, and then elects to apply for an equalization of family property. (at 116)

17. Section 6(10) of the *Family Law Act* should be amended to provide that a surviving spouse's election shall be filed within six months from the grant of letters probate or letters of administration. (at 116)

CONSEQUENCES OF AN ELECTION FOR EQUALIZATION

18. (1) Part I of the *Family Law Act* should be amended to provide that a surviving spouse may apply for letters probate or letters of administration as the personal representative of the estate of the deceased spouse.
- (2) Once the spouse elects equalization, Part I of the *Family Law Act* should preclude the surviving spouse from receiving a grant of probate or administration in the estate of the other spouse.
- (3) If the grant has already been made, Part I of the *Family Law Act* should provide for the removal of the surviving spouse as personal representative of the estate.
- (4) Part I of the *Family Law Act* should expressly permit a surviving spouse to act as a trustee or guardian under the terms of a will, even after electing equalization. (at 120)

DISTRIBUTION OF ESTATE

19. Section 6(14) and (15) of the *Family Law Act* should be amended by adding the words "to a beneficiary" immediately after the word "distribution". (at 120)
20. Section 6(14) of the *Family Law Act* should be amended to provide that no distribution to a beneficiary shall be made in the administration of a deceased spouse's estate without the written consent of the surviving spouse or without leave of the court until the earlier of:
 - (a) six months after the grant of letters probate or letters of administration; or
 - (b) the date on which an election is filed. (at 121)

PRIORITY OF EQUALIZATION ENTITLEMENT

21. Section 6(13) of the *Family Law Act* should be amended to apply to situations in which a spouse has contracted in good faith and for valuable consideration with a third party to leave an existing testamentary gift to that party unchanged, or to refrain from making a will so that the party will receive a share of the estate under the intestacy rules. (at 124)
22. Section 6(13) of the *Family Law Act* should be amended to provide as follows:
 - (a) the requirement of “good faith” refers to the intentions of the deceased spouse in entering the contract, regarding equalization; and
 - (b) the court must value the gift as of the valuation date. (at 124-25)
23. Consideration should be given to amending section 71 of the *Succession Law Reform Act* in a manner similar to that suggested for section 6(13) of the *Family Law Act* in recommendation 21. (at 126)
24. Section 6(12)(c) of the *Family Law Act* should be amended to provide that equalization payments have priority over orders under Part V of the *Succession Law Reform Act*. (at 128)
25. Part I of the *Family Law Act* should be amended to provide that the equalization obligation is a debt of the deceased spouse’s estate ranking subsequently to the claims of secured, preferred, and ordinary creditors. (at 128)

ALLOCATION OF BURDEN OF EQUALIZATION PAYMENT

26. Part I of the *Family Law Act* should be amended to provide as follows:
 - (a) all beneficiaries under the will of the deceased spouse shall bear the burden of the equalization payment rateably unless, in the opinion of the court, that would be inconsistent with the testator’s intentions;
 - (b) beneficiaries under the will of the deceased spouse have the right to apply to the court to allocate the burden of the equalization obligation; and

- (c) the court has the power to allocate the burden of the equalization obligation among the beneficiaries of the estate in a manner other than rateably if, in the opinion of the court, it would be consistent with the testator's intention to do so. (at 130)

ISSUES AFFECTING THE MATRIMONIAL HOME

- 27. Section 26(1) of the *Family Law Act*, which provides that if a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death, should be repealed. (at 132)
- 28. If the Legislature does not implement our recommendation to treat the family home ["matrimonial home"] like all other types of property for the purposes of equalization (see recommendation 7), section 26(1) of the *Family Law Act* should be amended to provide that a surviving spouse has a lien over a family home ["matrimonial home"] owned by the deceased spouse before death in joint tenancy with a third person. (at 132)
- 29. Section 26(2) of the *Family Law Act* should be amended to:
 - (a) extend the time of possession to six months;
 - (b) empower the court to extend the period;
 - (c) provide that the right of possession is applicable to all matrimonial homes; and
 - (d) provide that the possessory right is effective against the estate and against surviving joint tenants. (at 133-34)

CHAPTER 6 DO COMMON LAW REMEDIES CONTINUE TO PLAY A USEFUL ROLE?

30. Part I of the *Family Law Act* should be amended to preclude a spouse from applying as follows:
- (a) for a declaration of a remedial constructive trust with respect to property owned by his or her spouse, as restitution for his or her contribution, either direct or indirect, to the acquisition, preservation, or enhancement of that property.
 - (b) for a declaration of resulting trust with respect to property owned by his or her spouse, based on the common or presumed intention of the spouses regarding his or her contribution, either direct or indirect, to the acquisition, preservation, or enhancement of that property. (at 142-43)



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COMMISSION DE RÉFORME DU DROIT DE L'ONTARIO

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